U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF H-P-

DATE: NOV. 8, 2018

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a biomedical materials developer, seeks second preference immigrant classification as a member of the professions holding an advanced degree or as an individual of exceptional ability, as well as a national interest waiver of the job offer requirement attached to this EB-2 classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). After a petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion, grant a national interest waiver if the petitioner demonstrates: (1) that the foreign national's proposed endeavor has both substantial merit and national importance; (2) that the foreign national is well positioned to advance the proposed endeavor; and (3) that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016).

The Director of the Texas Service Center denied the Form I-140, Immigrant Petition for Alien Worker, and a subsequent motion, finding that the Petitioner had not established he qualified for classification either as a member of the professions holding an advanced degree or as an individual of exceptional ability.

On appeal, the Petitioner submits additional documentation and a brief, arguing that he qualifies for the underlying EB-2 visa classification.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

To establish eligibility for a national interest waiver, a petitioner must first demonstrate qualification for the underlying EB-2 visa classification, as either an advanced degree professional or an individual of exceptional ability in the sciences, arts, or business. Because this classification requires that the individual's services be sought by a U.S. employer, a separate showing is required to establish that a waiver of the job offer requirement is in the national interest.

Section 203(b) of the Act sets out this sequential framework:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. –
>
> > (A) In general. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of job offer –
> >
> > > (i) National interest waiver. . . . [T]he Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(k)(2) contains the following relevant definitions:

> *Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.
>
> *Exceptional ability in the sciences, arts, or business* means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.

Furthermore, the regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth the specific evidentiary requirements for demonstrating eligibility as an individual of exceptional ability.

Additionally, while neither the statute nor the pertinent regulations define the term "national interest," we set forth a framework for adjudicating national interest waiver petitions in the precedent decision *Matter of Dhanasar*, 26 I&N Dec. 884.[1] *Dhanasar* states that after EB-2 eligibility has been established, USCIS may, as a matter of discretion, grant a national interest waiver when the three prongs of the framework are met.[2]

---

[1] In announcing this new framework, we vacated our prior precedent decision, *Matter of New York State Department of Transportation*, 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998) (*NYSDOT*).

[2] *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

II. ANALYSIS

A. Member of the Professions Holding an Advanced Degree

The Petitioner presented his "Bachelor of Law" degree (August 1999) from in South Korea and an academic credentials evaluation from indicating that the aforementioned degree is the foreign "equivalent of bachelor's degree in legal studies from an accredited institution of higher education in the United States." In addition, he provided two "Certificate(s) of Career" from and that list his work experience at those companies.

In his appeal brief, the Petitoner contends that, in addition to holding the foreign equivalent of a U.S. bachelor's degree, he "has more than ten (10) years of experience in the field of biomedical materials engineering and alloy development," and that he therefore has the equivalent of an advanced degree in that specialty. The certificate from identified the Petitioner's position as "President/CEO" and listed his period of employment as "December 20, 2003 – April 25, 2010." This certificate also indicated that his duties involved "Consulting Services" from "2004~2009," "Engineering and Technology Research" from "2005~2010," "Sales and Marketing" from "2005~2010," and "Overseas Joint Venture Trial" from "2006~2008."

Additionally, the certificate from identified the Petitioner's position as "President/CEO" and listed his period of employment as "April 29, 2010 – January 25, 2015." This certificate stated that his duties involved "Approval Procedures from the Korean Ministry of Food and Drug Safety" from "April 2010 to October 2010," "R&D and Clinical Trials" from "May 2010~November 2012," "Patent Applications (Domestic and International)" from "October 2010~February 2014," and "Sales and Marketing of Osslo Alloys" from "January 2011~January 2015."

The Director noted that the Petitioner's work involved a variety of positions and duties, and found the record insufficient to demonstrate five years of progressive experience in the specialty. For example, the Certificate of Career from listed wholesale and retail sales direction, marketing, advertising, promotion, financial management, and oversight of day-to-day company business as part of his "main duties." Furthermore, the two Certificates of Career did not indicate how the Petitioner divided his time among these various responsibilities or specify the amount of time he devoted to biomedical materials engineering and alloy development.[3]

The record includes an October 2017 affidavit from the Petitioner and his updated résumé (November 2017) listing the percentage of time he claims to have devoted to research and development. In addition, the Petitioner presented "Expert Opinion Letter(s)" authored by and and credential evaluation reports prepared by Anthony Wallace,

[3] The Petitioner indicates that he seeks to continue research and development in biomedical materials engineering. Throughout these proceedings, the Petitioner has identified "biomedical materials engineering and alloy development" as both his specialty and proposed endeavor.

and He did not specifically identify or include copies of the evidence on which these evaluations were based, and we note that the reviewers reached different conclusions regarding the number of years of the Petitioner's work experience in his specialty. For example, asserted that the Petitioner had "ten years and eleven months" work experience as an "entrepreneur in biomedical materials engineering"; stated the Petitioner had "18+ years' experience in the biomedical engineering field"; and and each concluded that the Petitioner had "eleven years and one month experience" "in the area of dental noble alloys." Moreover, the "Expert Opinion Letter" allegedly prepared by was signed by The Petitioner must resolve inconsistencies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).[4] Regardless, this documentation is not sufficient to demonstrate five years of progressive experience in his specialty. The regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) specifies that that evidence of the progressive experience must be "in the form of letters from current or former employer(s)." Further, the regulation at 8 C.F.R. § 204.5(g) provides, in pertinent part:

> Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

Here, the Petitioner presented certificates from and including the name, address, and title of the writer, and a specific description of his duties as required under 8 C.F.R. § 204.5(k)(3)(i)(B) and (g), and we must rely on these documents from his former employers in determining his years of experience in biomedical materials engineering and alloy development.[5] Without further information and evidence from the Petitioner's former employers, the career certificates in the record do not offer sufficient information to demonstrate that he has at least five years of progressive post-baccalaureate experience in biomedical materials engineering and alloy development to constitute the equivalent to an advanced degree in that specialty. *See* 8 C.F.R. § 204.5(k)(2) and 8 C.F.R. § 204.5(k)(3)(i)(B). Accordingly, the Petitoner has not established that he qualifies as a member of the professions holding an advanced degree.

B. Exceptional Ability

The Petitioner also asserts that he meets at least three of the exceptional ability evidentiary criteria at 8 C.F.R. § 204.5(k)(3)(ii). The Director determined that the Petitioner's letters of recommendation,

[4] Furthermore, an evaluation performed by a credentials evaluator or school official is solely advisory in nature and the final determination rests with USCIS. *See Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988); *Matter of Sea*, Inc., 19 I&N Dec. 791 (Comm. 1988).

[5] Pursuant to the requirements under 8 C.F.R. § 204.5(k)(3)(i)(B) and (g) and because evidence relating to the Petitioner's work experience is available from his former employers, USCIS is not required to consider his affidavit, résumé, expert opinion letters, and credential evaluation reports in determining his years of progressive experience in the specialty.

patents, and documentation showing utilization of his products satisfied the regulatory criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F), which requires "[e]vidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations." As discussed below, a review of the record does not indicate that the Petitioner has met any of the remaining evidentiary criteria.

1. Evidentiary Criteria

> *An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability.* 8 C.F.R. § 204.5(k)(3)(ii)(A).

The record includes an official academic record showing that the Petitioner earned a Bachelor of Law degree from , but this degree does not relate to biomedical materials development. For this reason, the Petitioner has not established that he meets this regulatory criterion.

> *Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought.* 8 C.F.R. § 204.5(k)(3)(ii)(B)

The Petitioner asserts that he "has more than ten (10) years of experience from December 2003 to Janaury 2015 (11 years and 1 months [*sic*]) in the field of biomedical materials engineering and alloy development." However, as previously discussed, the two Certificates of Career from and did not indicate how the Petitioner divided time among his various business responsibilities and research and development duties, or specify the amount of time he devoted to working full-time as a biomedical materials developer. Without further information and evidence from the Petitioner's employers, his evidence does not meet this criterion.

> *A license to practice the profession or certification for a particular profession or occupation.* 8 C.F.R. § 204.5(k)(3)(ii)(C).

The record contains a medical device manufacturing license for and an accompanying disposition reflecting that this company changed its name to In addition, the Petitioner submits business registration, Certificate of Good Manufacturing Practice, and Venture Business Certification. These documents relate to the aforementioned company and they do not demonstrate that the Petitioner holds licenses or certifications for his profession or occupation as a biomedical materials developer. In addition, the Petitioner presents three of his Korean patents for metal and ceramic dental alloys. These patents are intellectual property securing the Petitioner's right to exclude others from making, using, or selling his inventions. They do not constitute a license to practice a profession or certification for a particular profession or occupation. Thus, the Petitioner does not meet this criterion.

Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability. 8 C.F.R. § 204.5(k)(3)(ii)(D).

The Petitioner provided a Certificate of Standard Financial Statements for indicating that this company recorded sales of 905,642,940 South Korean Won (KRW) in 2013. He also submitted an appraisal report valuing his three Korean patents at 3,643,500,000 KRW. In addition, he offered a U.S. business plan that forecasts sales revenue of $500 million after five years of operation. Finally, the record includes prevailing wage data from the Foreign Labor Certification Data Center reflecting earnings levels for U.S. "biomedical engineers" for July 2017 – June 2018.

The record, however, does not include evidence of the Petitioner's "salary" or "remuneration for services" in the United States or South Korea. Furthermore, he has not presented documentation showing that his earnings are indicative of exceptional ability relative to others performing similar services in the field. For example, the Petitioner has not established that the wage information for U.S. biomedical engineers constitutes an appropriate basis for comparison. Any South Korean earnings should be evaluated based on the wage statistics or other relevant evidence in that country, rather than converting his South Korean compensation to U.S. dollars and then comparing it to U.S. biomedical engineers. Based on the foregoing, the Petitioner has not demonstrated that he meets this regulatory criterion.

Evidence of membership in professional associations. 8 C.F.R. § 204.5(k)(3)(ii)(E).

The Director found that the Petitioner had not presented evidence showing he belongs to a professional association. His appellate submission does not contest the Director's finding or claim that he meets this criterion.

2. Comparable evidence

The regulation at 8 C.F.R. § 204.5(k)(3)(iii) allows for the submission of "comparable evidence" if the above standards "do not readily apply to the beneficiary's occupation." A petitioner should explain why he has not submitted evidence that would satisfy at least three of the criteria set forth in 8 C.F.R. 204.5(k)(3)(ii) as well as why the evidence he has submitted is "comparable" to that required under 8 C.F.R. 204.5(k)(3)(ii).[6]

On appeal, the Petitioner asserts that the expert opinion letters; the three Korean patents, business licenses, and certifications discussed above; and a letter describing his efforts to secure U.S. investors should be considered as comparable evidence of his eligibility. With respect to the expert opinion letters and Korean patents, the Director has already determined and stated in the initial decision that this evidence helped to satisfy the regulatory criterion at 8 C.F.R, § 204.5(k)(3)(ii)(F).[7] Regardless, the

[6] *See* USCIS Policy Memorandum PM-602-0005.1, *Evaluation of Evidence Submitted with Certain Form I-140 Petitions; Revisions to the Adjudicator's Field Manual (AFM) Chapter 22.2, AFM Update AD11-14* 22 (Dec. 22, 2010), https://www.uscis.gov/legal-resources/policy-memoranda.

[7] Furthermore, regarding the submitted letters, we note that "claims that USCIS should accept witness letters as

Petitioner has not demonstrated that the standards at 8 C.F.R. § 204.5(k)(3)(ii) are not readily applicable to his occupation.[8] He has not sufficiently explained why he has not submitted evidence that would satisfy at least three of the six regulatory criteria. As such, the Petitioner has not shown that he may rely on comparable evidence.

In summary, for the reasons discussed above, the record supports the Director's finding that the Petitioner did not meet at least three of the six regulatory criteria at 8 C.F.R. § 204.5(k)(3)(ii) or provide comparable evidence demonstrating his exceptional ability.

C. National Interest Waiver

The remaining issue is whether the Petitioner has established that a waiver of the requirement of a job offer, and thus a labor certification, is in the national interest. As previously outlined, in order to qualify for a national interest waiver, the Petitioner must first show that he qualifies for classification under section 203(b)(2)(A) of the Act as either an advanced degree professional or an individual of exceptional ability. As the Petitioner has not established eligibility for the underlying immigrant classification, we need not reach the issue of the national interest waiver.

III. CONCLUSION

The Petitioner has not established eligibility for EB-2 classification as a member of the professions holding an advanced degree or as an individual of exceptional ability.

ORDER: The appeal is dismissed.

Cite as *Matter of H-P-*, ID# 1730648 (AAO Nov. 8, 2018)

---

comparable evidence are not persuasive." *Id.*

[8] "General assertions that any of the six objective criteria described in 8 CFR 204.5(k)(3)(ii) do not readily apply to the alien's occupation are not probative and should be discounted." *See* USCIS Policy Memorandum PM-602-0005.1, *supra*, at 22.